

Nitassirikun (Migration) [2020] AATA 2531 (16 April 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Patcharadanai Nitassirikun
CASE NUMBER:	1800094
HOME AFFAIRS REFERENCE(S):	BCC2015/1758249
MEMBER:	Stephen Witts
DATE:	16 April 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 16 April 2020 at 12:33pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal or de facto relationship – sponsorship withdrawn – no further evidence provided – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 18 June 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant and the sponsor were in a genuine partner relationship.
5. It is noted by the Tribunal that on 1 April 2020 the Tribunal wrote to the applicant's representative, Ms Wong. In this letter the Tribunal noted to the applicant's representative that the sponsor had contacted the Tribunal and stated that the relationship has ceased and that the sponsor wished to withdraw the sponsorship. The Tribunal also noted that it may rely on this information in making a decision and may affirm the decision of the Department on the basis that the applicant was no longer in a relationship with the sponsor. The Tribunal invited any comments or response to this information in writing by 15 April 2020. It was further noted by the Tribunal that if an extension of time was required the applicant may ask for an extension before 15 April 2020. No reply was received to this notification. On that basis the Tribunal has proceeded to make a decision on the papers.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant and the sponsor are in a genuine spousal or de facto relationship.

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

10. According to the delegate's decision record, dated 18 December 2017, provided to the Tribunal by the applicant, the applicant, Mr Patcharadanai Nitassirikun, lodged a valid application for a UK Partner (Temporary) and BS Partner (Residence) on 18 June 2015 on the grounds of being in a partner relationship with an Australian citizen, Thi Yen Tran, who lodged the sponsorship in support of the application. The applicant was represented by migration agent, Ms Wong, as noted above.
11. In its decision the department noted that the applicant first arrived in Australia as the holder of a student visa in February 2015 and then subsequently did not attend any course of study and was non-compliant to those visa conditions. It was further noted by the Department that on 18 June 2015 the applicant lodged a combined partner visa application.
12. After an assessment of this application the Department refused the application on the basis that the applicant and the sponsor were not able to demonstrate that they present themselves as a married couple to family or the wider community, or that they undertook regular joint social activities, or that they provided sufficient evidence and information as prescribed by the matters under regulations 1.15A and 1.09A to demonstrate that the applicant is the spouse or de facto partner of the sponsor as defined under section 5F and 5CB of the Migration Act.
13. As noted above the Tribunal has considered the evidence provided that the sponsor has withdrawn sponsorship in regard to this application and gives this considerable weight in determining this matter. It is noted by the Tribunal that the applicant was given an opportunity to respond under s.359A but did not do so.
14. It is also noted by the Tribunal that the applicant's movement records indicate that the applicant left Australia on 29 January 2019 and has not subsequently returned.
15. In terms of the other evidence presented it is noted by the Tribunal that no further evidence has been provided by the applicant or the sponsor in regard to the key aspects used under the regulations to assess the genuineness of a relationship, and this includes financial aspects to a relationship, the nature of a household shared, social aspects of the relationship, and the nature of the commitment. The Tribunal finds that no evidence has been provided subsequent to this application of any relevance in regard to these specific matters. The Tribunal has also reviewed the evidence previously provided in the department file and finds that it also is not sufficient to demonstrate that there are any of the above aspects to the applicants and the sponsor's relationship.
16. On the basis of the above the Tribunal finds that the applicant and the sponsor do not have a mutual commitment to a shared life to the exclusion of others, that they do not have a genuine and continuing relationship, and that they do not intend to live together and not separately and apart on a permanent basis.
17. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of decision.
18. Therefore the applicant does not meet cl.820.211(2)(a).

19. It is further noted by the Tribunal that no evidence has been provided that the applicant meets any exception under the regulations.
20. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

21. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Stephen Witts
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).